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July 18, 2001

Commissioner Robert A. Laurie
Commissioner Robert Pernell
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Docket 01-SIT-1

Dear Commissioners Laurie and Pernell:

We are writing on behalf of the California Unions for Reliable Energy ("CURE") with regard to the Siting Committee's Initial Draft Modifications to the Siting Regulations. CURE has been a party to all but one of the non-peaker plant siting applications filed with the Commission since 1997. The Commission's current siting process is a model of open, transparent and effective decisionmaking concerning facilities that affect the interests of nearly all Californians. The process has allowed the Commission to approve 29 new power plants with a generating capacity of 11,267 new megawatts since 1999. In the vast majority of instances, the process has also allowed interested parties to voice their concerns and have those legitimate concerns addressed in a rational manner by the Commission and its Staff. Further, the process has generally allowed the Commission to review power plant applications within applicable statutory deadlines, except for those few cases where sister agencies have raised concerns that take some time to address – concerns that must be addressed by the Commission under the statutory authority granted it by the Warren-Alquist Act.

Because the current process has been effective, inclusive and efficient, it does not need a major overhaul. Many of the changes to the siting regulations proposed by the Committee appear to recognize the value of the existing process and are well-advised. However, other proposed changes threaten the very transparent and inclusive nature of the process that the Commission should strive above all to preserve. We urge the Committee to reject those changes and focus instead on

safeguarding the public's right to participate in the regulation of these important facilities.

We also recommend below a number of modifications that would further strengthen the existing siting process and enhance the Commission's environmental review in light of the changed circumstances facing the Commission since electricity deregulation. We urge the Committee to adopt these suggested changes.

I. PROPOSED CHANGES THAT SHOULD BE REJECTED

The modifications proposed for section 1212, section 1710(h), and section 1714.5(d) would unnecessarily and impermissibly limit public participation in the siting process. These changes should be rejected.

A. Section 1212

The Initial Draft Modifications recommend changing section 1212 of the Commission's regulations to make each party's right to present evidence and cross-examine witnesses discretionary with the presiding member and to allow the presiding member to elect informal hearing procedures in any given case. These changes would fundamentally alter the public's right to participate in power plant reviews and should not be adopted.

First, the Commission's rules require that the presiding member's proposed decision be based exclusively upon the evidentiary record in a proceeding. (20 CCR section 1751(a).)[1] If the rules were to allow the presiding member to restrict a party's ability to present information in the evidentiary record by testimony and cross-examination, as proposed by modified section 1212(c), they would effectively allow the presiding member to deny that party the ability to affect the Commission's decision and, thereby, participate in the process. In addition, the proposed change does not include any standard by which the presiding member should make this important decision nor any restriction in favor of allowing a party

[1] The Committee has proposed to modify this section to base the PMPD upon the "hearing record" in a proceeding. The hearing record includes unsworn public comment. While unsworn public comment is the appropriate means to raise certain issues, factual findings should be based on validated evidence that has been tested by cross-examination. Therefore, even if section 1751(a) is modified as proposed, the Commission should continue to allow factual evidence to be presented as sworn testimony subject to cross-examination, even if other matters are appropriately raised as public comment and considered by the Commission as such.

to participate. A party's fundamental right to participate in the process must not be subject to the standardless discretion of the presiding member. Such an approach does not foster public confidence or assurance in the openness and fairness of the Commission's decisions.

If the Commission seeks a more "efficient hearing process" through its proposed changes, as suggested by modified section 1212(c), there are far less draconian ways to achieve it. In fact, the proposed changes to section 1212(b) are designed to expand the presiding member's discretion to limit the use of oral testimony and cross examination, subject to objective standards. Furthermore, CURE has been party to several proceedings where the presiding member has routinely exercised the authority to limit oral testimony and cross examination. The proposed changes to section 1212(c), therefore, seem not only draconian, but wholly unnecessary.

Second, the proposed change to section 1212(e) would allow the presiding member to adopt the informal hearing procedures of Government Code sections 11445.10 *et seq.* "to enhance the ability of the parties to present information efficiently and effectively." Among other things, the informal hearing process of Government Code sections 11445.10 *et seq.* would allow the presiding officer to "limit the use of witnesses, testimony, evidence, and argument, and [to] limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal." (Gov't Code section 11445.40(b).) In other words, this proposal would not only give the presiding member the ability to deny a party the right to present record evidence to be considered in the Commission's decision, but also the right to make legal arguments, conduct discovery and question any other party's evidence. It would also do so without any objective standard or limitation on the presiding member's authority. In *no* sense would this proposal "*enhance* the ability of the parties to present information efficiently and effectively." Again, this is a sledgehammer solution to perceived inefficiencies in the hearing process that, at most, require some fine-tuning around the edges. It should be unequivocally rejected.

B. Section 1710(h)

In section 1710(h), the Committee has proposed to adopt by regulation language that the Legislature rejected earlier this year. The Commission should not seek to impose by fiat what the people's elected representatives have considered and rejected.

The Legislature passed and the Governor approved Senate Bill 28x ("SB1x-28") on May 22, 2001. During debate on this bill, the Legislature considered several potential modifications to the existing limitation contained in section 1710(h) on Staff's ability to have secretive, ex parte discussions with parties on substantive matters. For example, in the April 3rd version of SB1x-28, the bill proposed to add section 25526.1 to the Public Resources Code which, according to the Assembly Committee on Appropriations' summary, would have required the CEC to "adopt a regulation governing ex parte contacts, which allows substantive contacts between parties and CEC officials, but requires prompt disclosure and a written summary of the contact." Ultimately, however, the Legislature eliminated this provision from the bill, providing strong evidence of its intent that the Commission's existing ex parte requirements do *not* need modification.

Nevertheless, the Committee's proposed modifications now seek to adopt the precise ex parte proposal rejected by the Legislature. This does not give the appropriate deference to the determination of the Legislature to leave the Commission's ex parte rule unchanged. The Commission should not seek to override the Legislature by amending section 1710(h) as proposed.

Further, we agree with Staff that the proposed modification would undermine the intent of section 1710(a), which provides that hearings, workshops and conferences must be open to the public. (Memorandum from Richard K. Buell to Commissioners Laurie and Pernell, p. 1 (July 13, 2001).) We also agree that "meetings between staff and the parties … where negotiations occur regarding substantive issues, should be open to the public in order to preserve the public confidence in staff as an independent party to the proceedings." (*Ibid*.) The Committee should reject any changes to section 1710 that would allow ex parte contacts with Commissioners, Commissioner's advisors or Commission Staff on substantive issues.

C. Section 1714.5(d)

We also agree with Staff that the proposed modification to section 1714.5(d) would unnecessarily and unlawfully limit what Staff could consider when assessing the potential impacts of a project. Proposed section 1714.5(d) would require that agency comments within their area of expertise "be deemed to represent the position of the State of California" unless the comments conflict with state or federal law. "Staff believes that it should consider the agency's recommendations as

well as the environmental consequences of the project when formulating recommendations on a project." (*Ibid.*) We agree.

In fact, CEQA *requires* that the Commission independently analyze a project's environmental impacts, despite the findings or recommendations of other responsible agencies. CEQA states that: "[w]hen a project is to be carried out or approved by two or more public agencies, the determination of whether the project may have a significant effect on the environment *shall be made by the lead agency*…." (Pub. Res. Code § 21165 (emphasis added).) Therefore, we recommend adding a sentence to the modified provision making clear that nothing in section 1714.5(d) abrogates the Commission's or Staff's duty under CEQA to identify and mitigate the significant environmental impacts of a project.

II. SUGGESTED ADDITIONS

The Committee's review of the Commission's siting regulations presents a valuable opportunity to improve and strengthen the Commission's siting process by addressing deficiencies in the process that have become apparent since electric deregulation was implemented in California. We urge the Committee to propose adopting the following regulations to improve the Commission's consideration of water resource impacts, fuel diversity impacts, and market impacts in the post-deregulation era. We also recommend changes to the Commission's consideration of discovery disputes to make the consideration of such disputes more impartial and more responsive to the Commission's independent obligation to assess a project's environmental impacts.

A. Improve Consideration of Freshwater Impacts

The Siting Committee recently held a series of workshops on issues affecting the Commission's ability to license power plants. (Docket No. 00-SIT-2.) Among the issues considered were water supply and water quality impacts. Staff issued a series of recommendations following this water workshop that should be adopted here. Specifically, the Commission should develop and implement a policy that requires new generation to maximize water conservation measures for power plant cooling. (CEC Staff, Siting Constraints OII Workshop Summaries, Water Workshop Summary, p. 34 (June 14, 2001).)

As Staff explained:

The supply of water in California is critical for development of every sector of the economy. Although there are a number of sources from which water supply can be expanded, ultimately there is a limited supply of water in California. It is in the states interest to estimate the need for water in the state from all sectors and to evaluate options for expanding the supply of water, and to evaluate alternatives to the use of fresh inland water, including ground water. (*Ibid*.)

Therefore, Staff recommends that:

the Energy Commission develop and implement a policy that requires new generation to maximize water conservation measures for power plant cooling. SWRCB Resolution 75-58 requires the evaluation of alternative water supplies and/or cooling technologies. This policy, however, merely mandates the consideration of alternatives and does not prohibit the use of the freshwater for cooling, even is such alternatives are readily available. Therefore, staff believes that this policy does not adequately address the true costs of using fresh or even potable water for power plant cooling in California. In light of California's looming water supply crisis, the use of fresh or even potable water for power plant cooling poses issues that are ignored by the economic or [CEQA] criteria used by staff in past siting cases to determine the suitability of using alternative sources of cooling water or alternative cooling technology. …

The greatest emphasis in such a policy should be given to the use of dry cooling because, although more expensive, dry cooling significantly reduces facilities' water demand, removes a major siting constraint and ensures facility reliability during emergencies and droughts.

Emphasis should also be on using alternative sources of cooling water – such as wastewater, brackish groundwater, etc. … Finally, the policy should require whenever the use of fresh water is unavoidable, the maximum utilization of this resource. Projects using freshwater should be required to cycle this water 20 times or more and utilize zero discharge. (*Id*., pp. 34-35.)

We recommend implementing Staff's suggestion by adding the following language to section 1752 of the Commission's regulations as a new subsection (c)(4):[2]

> Minimize use of California's scarce freshwater resources by using dry cooling where feasible, non-fresh sources of cooling water where dry cooling or hybrid wet-dry cooling systems are not feasible, or by cycling cooling water a minimum of 20 times and utilizing a zero discharge system where fresh water for cooling is the only feasible alternative.

B. Add Consideration of Fuel Diversity Impacts

Another issue considered in the siting constraints workshops concerned the availability of natural gas to supply existing and proposed power plants in the state. Every plant licensed by the Commission since 1999 has proposed to use natural gas as its sole fuel source. The electricity market's reaction to the increase in natural gas fuel prices earlier this year demonstrates how vulnerable California's electric supply could be to volatility in natural gas markets due to its large and increasing dependence on natural gas for power plant fuel. The Commission should focus on and seek to mitigate this dependence before a catastrophe occurs by requiring findings on a plant's contribution to fuel diversity in its licensing decision.

We propose adding the following language to section 1752 of the Commission's regulations as a new subsection (m):[3]

> The extent to which the project expands the diversity of fuel sources used by generating plants in the state, including the projected availability and cost of the proposed fuel supply for the life of the project and the percentage of generating capacity in the state fueled by renewable fuel sources versus fossil fuel and nuclear fuel sources before and after licensing of the proposed project.

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[2] This would be a new subsection (b)(4) if the changes to section 1752 proposed in the Initial Draft Modifications are adopted.

[3] This would be a new subsection (l) if the changes to section 1752 proposed in the Initial Draft Modifications are adopted.

We also propose adding the following language to section 1741 as a new subsection (c) to further encourage the use of renewable fuel supplies:

> In order to improve reliability and reduce dependence of the state's generating plants on a single fuel type, any project proposing to use primarily a renewable, non-fossil fuel source shall be given priority in application review and shall receive expedited review.

C. Add Consideration of Market Impacts

The crisis experienced in California electricity markets over the last year suggests that the Commission should add consideration of a plant's potential market impacts in its licensing decision. For example, the Commission should encourage the licensing of plants whose output will be sold to publicly-owned or regulated utilities at cost-based rates. We propose adding the following language to section 1741 of the Commission's regulations as a new subsection (d):[4]

> The commission shall give preference to and expedite consideration of any project which has executed contracts to sell the majority of its output to publicly-owned or investor-owned regulated utilities at cost-based rates.

D. Improve Consideration of Discovery Disputes

In several recent siting cases, the presiding committee has resolved discovery disputes by rejecting requests for information that the Staff or an independent agency does not consider relevant. (*See, e.g.*, Docket No. 99-AFC-3, Committee Ruling re: CVRP Petition to Compel Production of Documents (Nov. 21, 2000); Docket No. 98-AFC-4, Committee Order in Response to CURE's Motion to Compel (Aug. 26, 1999).) This approach threatens the impartiality of Commission Staff as an independent party, and also abdicates the Commission's duty to independently assess a project's environmental impacts, whether or not another agency with expertise in the field has determined that a project complies with existing law.

[4] This would be a new subsection (c) if the change proposed in section II.B. of these comments is not adopted.

To address this problem, we recommend adding the following language to subsection 1716(f) of the Commission's regulations:

> The committee shall independently assess whether the information requested is relevant to make any decision on the notice or application and shall not defer to staff's or any other agency's assessments of the relevance or necessity of the information in ruling on the petition.

We look forward to discussing these recommendations with the Committee and other interested parties.

Sincerely,

Katherine S. Poole

KSP:bh
cc: CEC Dockets
Rick Buell, CEC (by e-mail)